1983

# Marathon Ranching Co. Ltd., and Hans W. Roeck v. Synergetics. A Utah Limited Partnership. By And Through Its General Partner. Lancer Industries. Inc. , A Corporation; And Addland Enterprises, Inc. : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

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| SYNERGETICS, a Utah Limited Partnership, by and through its general partner, LANCER INDUSTRIES, INC., a corporation; and ADDLAND ENTERPRISES, INC., | ) | |
| Plaintiffs-Respondents, | ) | |
| vs. | ) | |
| MARATHON RANCHING CO., LTD., and HANS W. ROECK, | ) | Case No. 19143 |
| Defendants-Appellants. | ) | |

BRIEF OF APPELLANTS

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

Honorable Phillip R. Fishler, Judge

Joel R. Dangerfield
Ronald W. Goss
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Defendants-Appellants

Ronald C. Barker
2870 South State Street
Salt Lake City, Utah 84115-3692
Attorneys for Synergetics, Plaintiff-Respondent

Robert L. Lord
431 South 300 East, #444
Salt Lake City, Utah 84111
Attorney for Addland Enterprises, Inc., Plaintiff-Respondent

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2870 South State Street
Salt Lake City, Utah 84115-3692
Attorney for Synergetics, Plaintiff-Respondent

Robert L. Lord
431 South 300 East, #444
Salt Lake City, Utah 84111
Attorney for Addland Enterprises, Inc., Plaintiff-Respondent

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BRIEF OF APPELLANTS

## NATURE OF THE CASE

This is an action for money damages and for rescission of an agreement providing for the exchange of certain real property owned by defendant Marathon Ranching Co., Ltd., located in the Province of Saskatchewan, Canada, for an ocean-going sailboat allegedly owned by plaintiff Addland Enterprises, based upon averments that the transaction was the product of defendant's fraud, misrepresentations and deceit.

## DISPOSITION IN THE LOWER COURT

After the district court denied defendants' motion to dismiss for lack of personal jurisdiction, default judgment was entered against defendants when Hans W. Roeck did not appear for the taking of his deposition pursuant to an order of the court.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and remand to the district court for entry of an order dismissing plaintiff's complaint for lack of personal jurisdiction.

## STATEMENT OF FACTS

On March 9, 1983, plaintiffs filed a complaint against defendants, seeking money damages and rescission of an agreement providing for the exchange of certain real property owned by defendant Marathon Ranching Co., Ltd., located in the Province of Saskatchewan, Canada, for an ocean-going sailboat allegedly owned by plaintiff, Addland Enterprises, Inc., then located in the State of California. The complaint and amended complaint allege that the exchange agreement was the product of defendants' fraud, misrepresentation and deceit.

The plaintiffs, respectively are a Utah limited partnership, whose general partner is an Illinois corporation, and a California corporation; and the defendants, respectively, are a Canadian Corporation and a Canadian citizen residing in California.

Prior to May 23, 1980, plaintiffs and defendants carried on negotiations in California, and Canada, for the exchange of Canadian property for an ocean-going sailboat (R. 25). On May 23, 1980, the negotiations culminated in the execution of an agreement in the City of Saskatoon in the Province of Saskatchewan, Canada, which provided that Marathon Ranching Co., Ltd., would convey to Y.M.S., a Utah partnership, certain Canadian real property

in consideration for an ocean-going sailboat, the "Enterprise," being sold to Marathon Ranching by Addland Enterprises, Inc., a California corporation (R. 25, 16-20). Synergetics was the previous owner of the sailboat. Concurrently therewith, on May 23, 1980, the "Enterprise" was conveyed from Addland Enterprises, Inc., to Marathon Ranching, under an instrument executed in Saskatchewan (R. 016-020). Thereafter, prior to filing the instant lawsuit, the parties exchanged telephone calls and correspondence regarding the agreement, and Hans Roeck came to Utah on a skiing vacation with his family at which time the agreement was discussed (R. 027-029).

Marathon Ranching Co., Ltd., is a corporation organized under the laws of the Province of Saskatchewan, Canada, with its principal place of business in Saskatoon (R. 24). Hans Roeck, its president, is a Canadian citizen residing in California. Neither defendant has ever been authorized to conduct business in Utah nor have either transacted business or maintained an office, other business facility or even a telephone in Utah (R. 024-025). No officer, director, agent or employee of either defendant has ever been stationed in Utah, nor were any sent to Utah to enter into negotiations for the purchase by defendants of the "Enterprise", which culminated in the purchase agreement executed in Saskatoon on May 23, 1980 (R. 24-25).

Marathon Ranching Co., Ltd., and Hans Roeck responded to plaintiffs' complaint and amended complaint by appearing specially and moving to quash service of summons and to dismiss the complaint for lack of jurisdiction (R. 21-22). In support of their motion to dismiss, defendant Hans Roeck submitted an affidavit contesting the court's jurisdiction. Plaintiffs did not

submit counter-affidavits or any other evidence to controvert Roeck's affidavit.

After a hearing, the Honorable David B. Dee denied defendants' motion to dismiss by an order entered on June 1, 1982, without findings of fact, conclusions of law or a memorandum decision (R. 42-43). Defendants filed a petition to grant an interlocutory appeal to the Utah Supreme Court (R. 87-89).

At a hearing on July 15, 1982, the district court stayed all proceedings pending grant or denial by the Utah Supreme Court of defendants' petition to grant an appeal (R. 84-86). The court directed that should the Supreme Court deny defendant's petition, they were required to file an answer or other responsive pleading to plaintiffs' amended complaint and to produce defendant Hans Roeck for the taking of his deposition within five business days thereafter (R. 85).

On July 22, 1982, the Utah Supreme Court denied defendants' petition to grant an appeal, and defendants filed an answer to the amended complaint (R. 66-70), again raising the defense of lack of personal jurisdiction.

On July 28, 1983, defendants moved the district court for a protective order on the grounds, inter alia, that all of the corporate books and records of defendant, Marathon Ranching Co., Ltd., a non-resident Canadian corporation, were kept and maintained in Canada, and that it would be unduly burdensome for defendant Roeck, who was under doctor's orders not

to travel at the time, and who was then in Hawaii, to come to Salt Lake City for the purpose of taking his deposition (R. 71-78). Plaintiffs responded by moving to strike defendants' answer and award a default judgment, and for an order compelling defendants to disclose the whereabouts of the boat and to cause it to be brought to a place designated by the court and held in storage pending the outcome of the litigation.

The court denied plaintiffs motions for sanctions, and to compel disclosure of the boat's whereabouts and to require it to be placed in storage, and ordered the defendant Roeck appear for his deposition no later than August 27, 1982 (R. 137-38).

On August 18, 1982, defendants moved for an order vacating the deposition date and for a protective order allowing the deposition of Hans W. Roeck to be taken on September 13, 1982 (R. 113-16).

On August 26, 1982, the district court entered an order requiring defendant Roeck to appear for a deposition no later than September 3, 1982 (R. 167-68). The court further ordered that in the event Roeck failed to appear, upon the ex parte application of plaintiff, defendants' answer would be stricken and default judgment entered (R. 167-68).

Pursuant to the notice of plaintiff Synergetics, the deposition of defendant Hans Roeck, was set for September 3, 1982, at 11:00 a.m. Defendant Roeck appeared for the deposition at the date and time specified in the notice. Following a series of questions concerning his personal life,

Roeck caused the deposition to be terminated by refusing to answer further questions and leaving the deposition (R. 204-06).

Following the aborted deposition, Roeck indicated his willingness to attend a rescheduled deposition and to submit to any proper questions posed by plaintiffs' attorneys (R. 206). Plaintiffs refused to accommodate Roeck's request and insisted that they were entitled to entry of a default judgment. On October 6, 1982, plaintiff Synergetics, filed a Supplemental Motion to Strike Defendants' Answer and to Enter a Default Judgment, or to Impose Sanctions Against Defendants, and for the court to issue "the equitable equivalent of a writ of replevin" to protect plaintiffs against loss of the boat.

At a hearing on November 18, 1982, the district court denied plaintiffs' motion, but ordered defendants to produce Roeck for the taking of his deposition by or before November 29, 1982 (R. 223-25). At the time the order was entered, Hans Roeck was outside of the continental United States, out of communication with his attorneys, and received no notice of the discovery order or default proceedings (R. 257).

Upon Roeck's non-appearance, the court entered default judgment against defendants on March 14, 1983. Plaintiffs were awarded judgment against defendants in the sum of $352,000 for conversion of the subject sailboat; title to the sailboat was quieted in plaintiffs; plaintiffs were awarded $100,000 in rental value of the sailboat; plaintiffs were awarded punitive damages in the sum of $200,000; all contracts and agreements between

plaintiffs and defendants were rescinded; and plaintiffs were awarded their costs (R. 279-82). In awarding damages, including punitive damages, the trial court did not hear any evidence or conduct a hearing.

## ARGUMENT

### I

### THE TRIAL COURT LACKED PERSONAL JURISDICTION OVER THE NON-RESIDENT DEFENDANTS BECAUSE INSUFFICIENT MINIMUM CONTACTS EXIST BETWEEN DEFENDANTS AND THE STATE OF UTAH.

Respondents do not allege that appellants are "doing business" in Utah sufficiently for general in personam jurisdiction to attach (R. 30-33, 240-243). See Burt Drilling, Inc. v. Portadrill, 608 P.2d 244, 246 (Utah 1980). Therefore, if jurisdiction over the non-resident defendants is to be had at all, it must be under the Utah Long-Arm Statute, Utah Code Ann. § 78-27-22 et seq. (Repl. 1977). Under that statute, a plaintiff must show that the claims upon which suit is brought "arose out of one or more of defendant's contacts within this state as set forth in Section 78-27-24." Roskelley & Co. v. Lerco, Inc., 610 P.2d 1307, 1309 (Utah 1980). Section 78-27-24 enumerates several varieties of contacts that warrant the court's exercise of personal jurisdiction over non-residents. Section 78-27-24 provides as follows:

> 78-27-24. Jurisdiction over nonresidents - Acts submitting person to jurisdiction. - Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
>
> (1) The transaction of any business within this state;

(2) Contracting to supply services or goods in this state;

(3) The causing of any injury within this state whether tortious or by breach of warranty;

(4) The ownership, use, or possession of any real estate situated in this state.

(5) Contracting to insure any person, property or risk located within this state at the time of contracting.

(6) With respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim.

Plaintiffs maintain in their amended complaint that defendants are subject to the jurisdiction of the Utah courts under § 78-27-24(1) ("transaction of any business within this state") and § 78-27-24(3) ("causing of any injury within this state") (R. 31).

Respondents indisputably had the burden of proving facts necessary to establish the personal jurisdiction of the district court. See, e.g., Air Kaman, Inc. v. Penn-Aire Aviation, Inc., 526 F.Supp. 66, 68 (D. Conn. 1981). A plaintiff must plead sufficient material facts to establish a basis for jurisdiction under a state's long-arm statute. Hickock Teaching Systems, Inc. v. Equitech, 421 So. 2d 722, 723 (Fla. Dist. Ct. App. 1982); Verges v. Lomas & Nettleton Financial Corp. 642 S.W. 2d 820, 821 (Tex. Civ. App. 1982). See Fleet Leasing Inc. v. District Court, _____, Colo. _____, 649 P.2d 1074, 1078 (1982); Howard v. Craighead, _____ Ark. _____, 644 S.W. 2d 256, 257 (1983); United States Dental Institute v. American Association of Orthodonists, 396 F.Supp. 565 (D.C. Ill. 1975); Texair Flyers v. District Court, 180 Colo. 432, 506 P.2d 367 (1973); Wuertz v. Garvey, _____ Minn.

_____, 178 N.W. 2d 630 (1970). In meeting this burden mere conclusory allegations do not suffice. Howard v. Craighead, supra, 644 S.W. 2d at 257; Nacci v. Volkswagen of America, 297 A.2d 638 (Del. Super. Ct. 1972). If, as in the present case, a defendant challenges plaintiff's jurisdictional allegations by affidavit, the plaintiff must then support its allegations by affidavit or other proof. Hickock Teaching Systems, Inc. v. Equitech, supra 421 So. 2d at 773. On a motion to dismiss for lack of personal jurisdiction, if a defendant's affidavit contesting jurisdiction is not refuted by a counter-affidavit filed by the plaintiff, the facts alleged in the defendant's affidavit are taken as true. Caicos Petroleum Service Corp. v. Hunsaker, 551 F. Supp. 152, 153 (N.D. Ill. 1982); Kutner v. DeMassa, 96 Ill. App. 3d 243, ____, 421 N.E. 2d 231, 235 (1981); Oddi v. Mariner Denver, Inc., 461 F.Supp. 306, 310 (S.D. Ind. 1978).

In the present case, the plaintiffs alleged in their amended complaint that prior to the execution of the agreement of May 23, 1980, defendant, Hans Roeck, "made several telephone calls to offers [sic] and agents of the plaintiffs, Synergetics and Lancer, into the State of Utah, to discuss the transaction which is the subject matter of plaintiffs' complaint herein" (R. 31). In his affidavit in support of defendants' motion to dismiss for lack of personal jurisdiction, Hans Roeck stated that the negotiations for the exchange of plaintiff's sailboat for the Saskatchewan property occurred in California and Canada, and that no agent, officer, director or employee of Marathon Ranching Co., Ltd., had ever been sent into the State of Utah to conduct business (R. 24-25). Plaintiffs did not controvert the statement in Roeck's affidavit that the May 23, 1980, agreement was negotiated in Canada and California, not Utah.

Plaintiffs' factual allegations contained in their amended complaint and the affidavit of Robert D. Kent annexed thereto, in support of personal jurisdiction, are as follows: First, prior to the execution of the May 23, 1980, agreement, Roeck made several telephone calls into Utah to discuss the transaction. Secondly, after the execution of the May 23, 1980, agreement, Roeck wrote several letters made several telephone calls into Utah from California, Canada and elsewhere to plaintiffs' officers concerning the transactions. Last, on or about March 17, 1981, plaintiffs allege that Roeck came to Utah and negotiated, an agreement modifying the May 23, 1980, agreement (R. 30-33).

Appellants' single isolated physical contact with Utah for the purpose of a skiing trip, at which time an incidental negotiations of a modification to the May 23, 1980, agreement occurred, does not afford a basis for personal jurisdiction in an action to rescind the original agreement.

In Roskelley & Co. v. Lerco, Inc., 610 P.2d 1307 (Utah 1980), plaintiff brought an action against defendant, a Kentucky corporation, alleging breach of an oral contract to pay a commission in connection with the sale of certain machinery by defendant for use in Utah by a Utah corporation. The defendant moved to quash service of process, supporting the motion by an affidavit of its president. The affidavit recited that plaintiff had telephoned defendant in Kentucky to inquire about the possibility of acting as broker for the defendant in Utah. Defendants sold machinery to U.S. Steel Credit Corporation, which was ultimately leased to Utah American Steel and installed

in Utah. Thereafter, defendants' officers and representatives traveled to Utah to supervise the installation of the machinery.

In reversing the lower court and ordering plaintiff's complaint dismissed for lack of personal jurisdiction, the Utah Supreme Court noted that plaintiffs could not rely upon defendants' Utah contacts with respect to the installation of the machinery to form a jurisdictional basis for their contract claim.

> But we are not here concerned with defendant's contract for the sale of goods to U.S. Steel Credit Corporation, nor with the installation of the equipment at the Utah American Steel plant, and plaintiff's claim does not arise out of those activities.
>
> * * *
>
> Here, defendant's purposeful activities within this State consisted of its sale of equipment ultimately destined for installation in this State, and its entry into this State for the purpose of overseeing the installation of that equipment. These contacts would be sufficient for the establishment of limited jurisdiction if this litigation concerned an action for breach of warranty or negligence in installing the equipment, brought by Utah American Steel or U.S. Steel Credit Corporation, but this plaintiff cannot avail himself of such contacts for the purpose of his claim on an entirely different contract. To do so he must show that this State has general jurisdiction; to wit, the defendant has conducted substantial and continuous business in this State. Plaintiff has shown no purposeful activity on the part of defendant within this State by which it could be said that defendant knew or should have known that it was subjecting itself to the jurisdiction of our Courts, for the purposes of this alleged contract for commissions.

610 P.2d at 1309, 1312 (emphasis added).

All of plaintiffs' causes of action as set forth in their complaint and amended complaint arise under "various purported contracts and agreements" entered into in May, 1980 (R. 2-3). The relief prayed for was rescission of that agreement, together with compensatory and punitive damages (R. 4). The purported modification agreement of March 17, 1981, concerning which

Roeck made his only physical contact within the State of Utah, is not at issue in this litigation.

As to subjecting appellants to personal jurisdiction in Utah for the purpose of suit on the May 23, 1980, agreement, there are only two factors to which respondents can point tying Marathon Ranching Co., Ltd. and Hans Roeck to Utah, viz., telephone calls to Utah prior to the transaction, and telephone calls and letters to Utah subsequent to the transaction. With respect to the pre-May, 1980, telephone calls, they did not involve negotiations for the sale and purchase of the subject sailboat (R. 25). It is evident from the United States Supreme Court cases that it would be unconstitutionally impermissible and unfair to subject appellants to the personal jurisdiction of the Utah Courts under these circumstances.

The due process clause of the fourteenth amendment serves as a limitation on state assertions of jurisdiction over non-resident defendants pursuant to long-arm statutes. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 100 S.Ct. 559, 564, 62 L.Ed. 2d 490, ____ (1980).

The purpose of the Utah long-arm statute is to permit the exercise of jurisdiction over non-residents to the extent permitted by the due process clause. Utah Code Ann. § 78-27-22 (Repl. 1977). Therefore, a court must engage in a "search for the outer limits of what due process permits." Tietloff v. Lift-a-Loft Corp., _____ Ind. App. _____ 441 N.E. 2d 986, 989 (1982). The scope of the due process inquiry has evolved from numerous Supreme Court cases and is well-settled. Peanut Corp. of America v. Hollywood Brands, Inc., 696 F.2d 311, 314 (4th Cir. 1982).

In determining the constitutional reach of a state's personal jurisdiction over a non-resident who maintains only a single or few contacts with the forum courts have applied a three-pronged test:

> First, the defendant must have purposefully availed itself of the privilege of acting within the forum state thus invoking the benefits and protections of its laws. Hanson v. Denckla, supra, 357 U.S. 235 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958). Secondly, the cause of action must arise from defendant's activities within the forum state. See Southern Mach. Co. v. Mochasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968); Electric Regulator Corp. v. Sterling Extruder Corp., 280 F.Supp. 550 (D.Conn. 1968). Lastly, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable. International Shoe Co. v. Washington, 326 U.S. 310 66 S.Ct. 154, 90 L.Ed. 95 (1945); See Southern Mach Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968); See also In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Kourkene v. American BBR, Inc., 313 F.2d 769 (9th Cir. 1963).

Proctor & Schwartz v. Cleveland Lumber Co., 228 Pa. Super. 12, ____, 323 A.2d 11, 15 (1974). Accord, Russell v. Balcom Chemicals, Inc., 328 N.W. 2d 476, 478-79 n.4 (S.D. 1983); Siskind v. Villa Foundation for Education, Inc., 642 S.W. 2d 434, 436 (Tex. 1982).

The Supreme Court recently reaffirmed the well-established rule of International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, ___ (1945), that due process requires that certain "minimum contacts" exist between the non-resident defendant and the forum state before a court may exercise personal jurisdiction. World-Wide Volkswagen Corp. v. Woodson, supra, 444 U.S. at 291, 100 S.Ct. at 564. In that case the Supreme Court also refined the "minimum contacts" doctrine by distinguishing its two separate functions: (1) ensuring a fair and reasonable forum for the defendant, and (2) ensuring territorial limits on state power. Id. at 292, 100

S.Ct. at 564. The Supreme Court explained that the protection against inconvenient litigation is founded on a concept of reasonableness or fairness with a primary emphasis on the burden to the defendant. Id. at 292, 100 S.Ct. at 564. The defendant's contacts with the forum must be "such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'" Id. at 292, 100 S.Ct. at 564, quoting International Shoe Co. v. Washington, supra, 326 U.S. at 316, 66 S.Ct. at 158. In this regard, it is critical that the "defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, supra 444 U.S. at 297, 100 S.Ct. at 567.

The Utah decisions are consistent with the foregoing.

In Brown v. Carnes Corp., 611 P.2d 378, 380 (1980), the Utah Supreme Court held that the due process inquiry mandates consideration of (1) whether the cause of action arises out of or has a substantial connection with defendant's activity within the state; (2) the balancing of the convenience of the parties and the interest of the state in assuming jurisdiction; and (3) the character of the defendant's activity within the state.

In Mallory Engineering v. Ted R. Brown & Assoc., 618 P.2d 1004, 1007 appeal dismissed, 449 U.S. 1029 (1980), the Utah Supreme Court described the standard for the exercise of personal jurisdiction over a non-resident defendant as follows:

> The resultant standard for determining a nonresident's amenability to the jurisdiction of the state courts is not whether the nonresident is "present" in the state, but rather whether the nonresident has such contacts with the "state of the forum as make it reasonsable, in the context of our federal system of government, to require the (nonresident) to defend the particular suit which is brought." [Emphasis added.] This reasonableness standard, incorporating the requirements of fair play and substantial justice, looks to the quality and nature of the nonresident's contacts with the forum state. Therefore, the central concern of the inquiry into personal jurisdiction is the relationship of the defendant, the forum, and the litigation, to each other.

(Emphasis added.)

The use of the telephone, mail, and other arteries of communication are consistently and decisively held by courts of all ranks and jurisdictions to be insufficient activity within the forum state to allow jurisdiction. "The use of interstate facilities (telephone, the mail), the making of payments in the forum State, and the provision for delivery within the forum state are secondary or anciliary factors and cannot alone provide the 'minimum contacts' required by due process." Scullin Steel Co. v. National Railway Utilization Corp., 676 F.2d 309, 314 (8th Cir. 1982) (citations omitted). See, e.g., Jadair, Inc. v. Walt Keeler Co., 679 F.2d 131 (7th Cir) cert. denied, 103 S.Ct. 258 (1982); Mountaire Feeds, Inc. v. Agro Impex, S. A., 677 F.2d 651 (8th Cir. 1982); Leney v. Plum Grove Bank, 670 F.2d 878 (10th Cir. 1982); Kransco Manufacturing v. Markwitz, 656 F.2d 1376 (9th Cir. 1981); Cascade Corp. v. Hiab-Foco AB, 619 F.2d 36 (9th Cir. 1980); Thos. P. Gonzalez Corp. v. Consejo Nacional de Producion, 614 F.2d 1247 (9th Cir. 1980); Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 597 F.2d 596 (7th Cir. 1979); Cives Corp. v. American Electric Power Co., 550 F.Supp. 1155 (D.Me. 1982); Terrydale Liquidating Trust v. Gramlich,

549 F.Supp. 529 (S.D.N.Y. 1982); Fischer v. Hilton, 549 F.Supp. 389 (D.Del. 1982); Freedom Forge Corp. v. Jersey Forging Works, 549 F.Supp 99 (M.D. Pa. 1982); Coil Co. v. Weather-Twin Corp., 539 F.Supp. 464 (S.D.N.Y. 1982); Breiner Equipment Co. v. Dynaquip, Inc., 539 F.Supp. 204 (E.D.Mo. 1982); C.F.H. Enterprises v. Heatcool, 538 F.Supp. 774 (D.Colo. 1982); Douglas Battery Manufacturing Co. v. Taylor Auto Supply, 537 F.Supp. 1072 (M.D.N.C. 1982); Ruggieri v. General Well Service, Inc., 535 F.Supp. 525 (D.Colo. 1982); Carter Oil Co. v. Apex Towing Co., 532 F.Supp. 364 (E.D.Ark. 1981); Kennedy v. Ziesmann, 526 F.Supp. 1328 (E.D.Ky. 1981); Infomed v. Healthcare of Louisville, 526 F.Supp. 1287 (D.N.J. 1981); Associated Inns & Restaurant Co. v. Development Associates, 516 F.Supp. 1023 (D.Colo. 1981); Dogan v. Harbert Construction Corp., 507 F.Supp. 254 (S.D.N.Y. 1980); Craig v. General Finance Corp., 504 F.Supp. 1033 (D.Md. 1980); Baron & Co. v. Bank of New Jersey, 497 F.Supp. 534 (E.D.Pa. 1980); Sayles Biltmore Bleacheries, Inc. v. Soft-Fab Textile Processors, 440 F.Supp. 1010 (S.D.N.Y. 1977); McQuay Inc. v. Samuel Schlosberg, Inc., 321 F.Supp. 902 (D.Minn. 1971); Coast to Coast Marketing Co. v. G & S Metal Products Co., 130 Ariz. 506, 637 P.2d 308 (Ct. App. 1981); Tube Turns Division of Chemetron Corp. v. Patterson Co., 562 S.W.2d 99 (Ky. Ct. App. 1978); Kreisler Manufacturing Corp. v Homstad Goldsmith, 322 N.W.2d 567 (Minn. 1982); Shady Valley Park & Pool v. Dimmic, 576 S.W.2d 579 (Mo. Ct. App. 1979).

Plaintiffs' claim that long-arm jurisdiction exists pursuant to Utah Code Ann. § 78-27-24(3) ("causing of any injury within this state") (R. 31), is decisively refuted in the case of Hydroswift Corp. v. Louie's Boats & Motors,

Inc., 27 Utah 2d 233, 494 P.2d 532 (Utah 1972). In Hydroswift, plaintiff, a Utah corporation, sold boats to defendant, a foreign corporation. Defendant refused to pay for the boats, claiming that they were defective and hence unacceptable. Plaintiff brought suit in Utah for conversion. Defendant appeared specially and moved to quash service of process. In affirming the lower court's order granting defendant's motion to quash, the Utah Supreme Court rejected plaintiff's argument that the conversion, if one took place, committed in Oregon, constituted "the causing of any injury" (i.e., nonpayment of the purchase price) in Utah.

Plaintiff's assert a second jurisdictional basis under the long-arm statute, Utah Code Ann. § 78-27-24(1) ("transaction of any business within this state") (R. 30-31). When considered within the framework of due process, it is quite apparent that defendants' Utah contacts are insufficient to support the lower court's exercise of personal jurisdiction over them.

In the case of Hydraulics Unlimited Manufacturing Co. v. B/J Manufacturing Co., 323 F.Supp. 996 (D. Colo.), aff'd 449 F.2d 775 (10th Cir. 1971), the Kansas defendants learned of a potential patent violation by Colorado plaintiffs. Defendants came to Colorado to inspect the patented item. Following their visit they threatened plaintiff with a suit for patent infringement. Negotiations for a non-exclusive license agreement between plaintiffs and defendants occurred in Kansas, followed by the plaintiffs signing the agreement in Colorado while the defendants executed it in Kansas. Subsequently, plaintiffs sued to declare the patent invalid. Defendants moved to quash service of process and to dismiss the complaint for lack of

personal jurisdiction. Plaintiffs relied on the "transaction of any business within the state" provision of the Colorado long-arm statute for personal jurisdiction over defendants. The district court held, and the circuit court affirmed, that minimal contacts were lacking even though the defendants had actually been present in Colorado prior to the execution of the contract.

Associated Inns & Restaurant Co. v. Development Associates, 516 F.Supp. 1023 (D.Colo. 1981), involved a more recent interpretation of the same provision of the Colorado long-arm statute, which is similar to that of Utah. Associated Inns was an action to recover damages arising from two hotel management agreements and to collect on a promissory noted executed by some of the defendants. The first contract and the promissory note were executed while the plaintiff's corporate offices were in Ohio. Later plaintiff moved its offices to Denver, Colorado. Defendant went to Denver several times to discuss details of the operation of the contract with plaintiff. Suit was filed in federal district court in Colorado and defendants moved to dismiss for lack of personal jurisdiction.

The court held that there was no jurisdiction over defendant regarding one contract, as follows:

> While it is true that the defendant voluntarily came to Colorado to discuss some details of the management agreement with plaintiff, I believe that "basic considerations of fairness" under the International Shoe test dictate that these contacts are an insufficient basis for jurisdiction. It was only because plaintiff moved its offices to Colorado that the defendants ever came to Colorado to discuss the contract. Defendants' willingness to continue to deal with plaintiff after plaintiff's move to Colorado is not a sufficient basis for jurisdiction. See, Kulko v. Superior Court, 436 U.S. 84, 97-98, 98 S.Ct. 1690, 1699-1700, 56 L.Ed.2d 132 (1978).

Associated Inns, 516 F.Supp. at 1026. The second contract was executed in Eugene, Oregon, after the plaintiffs had moved to Denver, Colorado. Thereafter a meeting was held in Colorado between plaintiffs and defendants regarding the operational details of this contract. The court held that "defendant's participating in a single meeting with plaintiff in Colorado may still not be a sufficient basis for jurisdiction . . .." Associated Inns, 516 F.Supp. at 1027.

The court also held there was no jurisdiction over the promissory note cause of action as the only contacts relating to Colorado involving it were interstate mail correspondence.

In Friedr. Zoellner (New York) Corp. v. Tex Metals Co., 396 F.2d 300 (2d Cir. 1968), a New York corporation brought suit in New York against a Texas corporation for the loss of certain metals and ores which occurred in a warehouse rented by the defendant in New Orleans. It brought suit immediately following a meeting between plaintiff and the president of defendant and his counsel met in New York plaintiff in an attempt to resolve the difficulties between the parties. When that meeting failed to achieve the desired result, plaintiff brought suit. The court could not find any jurisdiction based upon a section of the New York long-arm statute which provides jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state . . . if he . . . expects or should reasonably expect the act to have consequences in the state and derive substantial revenue from interstate or international

commerce." Freidr. Zoelner, 396 F.2d at 302. The injury did not occur in New York, said the court, as the loss occurred in New Orleans. The court was also unable to find jurisdiction based upon the "transacting business" section of the statute, because it held that the single trip into New York by the defendant in an attempt to resolve problems was not sufficient to constitute transaction of business within the state.

In Galgay v. Bulletin Co., 504 F.2d 1062, (2d Cir. 1974), a New York corporation sued a Pennsylvania corporation in New York, basing its jurisdiction upon the "transacting business" section of the New York long-arm statute. The parties negotiated a contract by telephone, which was executed in New York. Plaintiff built machinery in New York and defendant came into the state transport it to into Pennsylvania where the plaintiff installed it. The Court of Appeals said that the in-state presence of the defendants, while essential, was only of "minor or accidental importance" and was insufficient to base jurisdiction. The execution of the contract in New York did not show purposeful business activity in New York on the part of defendant, because the contract was executed by plaintiffs. Finally, the court ruled that a clause of the contract which stated that it was to be interpreted and governed by New York law was merely a choice of law, and did not have jurisdictional implications.

New Jersey's long-arm statute provides for in personam jurisdiction "consistent with due process of law". N. J. Court Rules, 4:4-4 (c)(1). This has been interpreted by the New Jersey Courts to allow service of process to the outer bounds of due process. In Infomed v. Healthcare

of Louisville, 526 F.Supp. 1287, (D.N.J. 1981), the defendant, a Kentucky corporation, sent representatives into New Jersey to inspect the plaintiff's ability to perform a proposed contract and to review the terms of the contract. The contract provided that all of the work save installation was to be performed by the plaintiff in New Jersey. Defendant signed and accepted the contract in New Jersey, and the contract specifically provided for New York law to govern the contract. Relying on World-Wide Volkswagen, supra, the federal district court in New Jersey held that it could not, consistent with due process of law, exercise jurisdiction over defendant Healthcare. Infomed, 526 F.Supp. at 1289. The court based its holding on the fact that "[d]efendant Healthcare clearly does not have sufficient ties with New Jersey so that it may be sued here for all purposes . . .." Id. The single visit was "isolated" and could "hardly be characterized as purposefully availing oneself of the privilege of conducting activities within New Jersey such that it 'should reasonably anticipate being hailed into court here'. World-Wide Volkswagen Corp. v. Woodson, supra." Id. at 1289-90. The plaintiffs in-state activity was a unilateral act and by Hanson v. Denckla, could not serve as a basis for in personam jurisdiction. Finally, the choice of law provision of the contract does not constitute a consent to in personam jurisdiction in New Jersey.

Maintenance of jurisdiction over appellants in the present case would be contrary to the salutary principles enunciated in International Shoe, World-Wide Volkswagen and the foregoing cases.

Moreover, because plaintiffs' causes of action must arise directly out of defendants' activities in the forum state, see Roskelley & Co. v. Lerco, Inc., 610 P.2d at 1312, the mere fact that Roeck subsequently came to Utah and discussed a modification does not provide the necessary minimum contacts. Numerous cases hold that the mere in-state presence of the defendant engaging in some activities which relate in some degree to the litigation is not enough to show that the defendant is purposely availing himself of the state's laws. See, e.g., Kransco Manufacturing v. Markwitz, 656 F.2d 1376 (9th Cir. 1981); Galgay v. Bulletin Co., 504 F.2d 1062 (2d Cir. 1974); Carter Oil Co. v. Apex Towing Co., 532 F.Supp. 364 (E.D. Ark. 1981); Activox, Inc. v. Envirotech Corp., 532 F.Supp. 248 (S.D.N.Y. 1981); Infomed v. Healthcare of Louisville, 526 F.Supp. 1287 (D.N.J. 1981); Associated Inns & Restaurant Co. v. Development Associates, 516 F.Supp. 1023 (D.Colo. 1981); Dogan v. Harbert Construction Corp., 507 F.Supp. 254 (S.D.N.Y. 1980); Sayles Biltmore Bleacheries, Inc. v. Soft-Fab Textile Processors, 440 F.Supp. 1010 (S.D.N.Y. 1977); Weyrich v. Lively, 361 F.Supp. 1147 (D.Colo. 1973); Aurea Jewelry Creations, Inc. v. Lissona, 344 F.Supp. 179 (S.D.N.Y. 1972); Hydraulics Unlimited Manufacturing Co. v. B/J Manufacturing Co., 323 F.Supp. 996 (D.Colo. 1971); Wood v. Moody-McMaster, Inc., 107 Ill.App.3d 116, 437 N.E.2d 373 (App. Ct. 1982); Northern Insurance Co. v. B. Elliott, Ltd., 117 Mich.App. 308, 323 N.W.2d 683 (Ct. App. 1982); McKee Electric Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 229 N.E.2d, ___ N.Y.S.2d (1967); Crompton v. Park Ward Motors, ___ Pa. Super. ___, 445 A.2d 137 (1982).

Requiring defendants to answer in Utah for their participation in a transaction executed in the province of Saskatchewan, the object of which was

to exchange Canadian property for an ocean-going sailboat docked in California, is repugnant to the fundamental fairness principle of International Shoe and its progeny. It is difficult to imagine a more egregious instance involving a total lack of minimum contacts.

## ARGUMENT

### II

### THE TRIAL COURT ERRED IN ASSESSING DAMAGES WITHOUT A HEARING.

In this case, the lower court awarded respondents the sum of $352,000 as damages for conversion of the boat, together with punitive damages in the amount of $200,000, and $100,000 for the rental value of the boat. In making this award, the court heard no evidence, conducted no hearing, and relied solely on the affidavit of Robert D. Kent, Jr., the secretary of Lancer Industries, Inc.

The award of damages in default judgments is governed by Rule 55(b)(2) of the Utah Rules of Civil Procedure, which provides as follows:

> By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

The lower court's ruling is clearly erroneous in light of Security Adjustment Bureau, Inc. v. West, 20 Utah 2d 292, 437 P.2d 214 (1968). In that case a default judgment with punitive damages was entered against the appellant. In awarding punitive damages the trial court did not hear any

evidence or conduct a hearing. On appeal from a refusal to set aside the default judgment, the Utah Supreme court observed, "West also contends that the court erred in awarding punitive damages without proof. With this we agree, which in and of itself justifies a vacation of the default." Id. at 293, 437 P.2d at 215. Other courts have adopted a similar position. See Valdery v. Sams, 307 P.2d 189, 191 (Colo. 1957); Gallegos v. Franklin, 89 N.M. 118, , 547 P.2d 1160, 1167 (Ct. App. 1976); Graves v. Walters, 534 P.2d 702 (Okl. Ct. App. 1975); Johanson v. United Truck Lines, 383 P.2d 512, 516 (Wash. 1963); Flahs v. Koegel 504 F.2d 702, 707, (2d Cir. 1974); Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 69-72 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363, 93 S.Ct. 647, 34 L. Ed. 2d 577, reh. denied, 410 U.S. 975 (1973).

The court's award of $352,000 as compensatory damages for "conversion" of the sailboat and $100,000 in "rental value" was likewise erroneous in the absence of proof.

It is well-settled that a default does not admit the amount of unliquidated damages. See, e.g., 6 Moore's Federal Practice § 55.07 (1982). A default judgment entered on well-pleaded allegations establishes defendant's liability. Where damages are unliquidated and uncertain, Rule 55(b)(2) of the Utah Rules of Civil Procedure requires the plaintiff to prove the extent of damages established by the default. See Eisler v. Stritzler, 535 F.2d 148, 153-54 (1st Cir. 1976); Flaks v. Koegel, 504 F.2d 702, 707 (2d Cir. 1974); Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 69-72 (2nd Cir. 1971), rev'd on other grounds, 409 U.S. 363, S.Ct. 647, 34 L. Ed. 2d 577, reh. denied, 410 U.S.

975 (1973); Gallegos v. Franklin, 89 N.M. 118, ____, 547 P.2d 1160, 1165 (Ct. App. 1976).

Where the plaintiff's damages are for an unliquidated amount, it is error to assess damages after a default judgment without a hearing. See, e.g., Eisler v. Stritzler, supra 535 F.2d at 153-54; Gill v. Stolow, 18 F.R.D. 508 (S.D.N.Y. 1955).

The damage awards for conversion in the amount of $352,000 and rental value in the amount of $100,000 were unliquidated and uncertain. There was no evidence offered to establish either of these figures other than plaintiff's consulory and self serving affidavit. In the absence of proof to establish a fixed, liquidated damage amount, the lower court erroneously awarded those damages.

## ARGUMENT

### III

### THE ULTIMATE SANCTION OF ENTERING DEFAULT JUDGMENT CONSTITUTED A DENIAL OF DUE PROCESS UNDER THE FACTS OF THIS CASE.

It is fundamental that the lynchpin of due process consists of notice to a party before his or her rights are affected by judgment. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 79, 92 S. Ct. 1983, _____, 32 L.Ed. 2d 566, 569 (1972); Graham v. Sawaya, 632 P.2d 851, 853 (Utah 1981). In the present case, Hans Roeck was outside of the continental United States and out of communication with his attorneys at the time the discovery order and default judgment were entered, and had no notice or knowledge of these proceedings

(R. 256-57). Under such circumstances, entry of default judgment against him in the sum of $652,000 constitutes a denial of due process.

It is uniformly recognized that the ultimate sanction of striking a defendant's answer and entering a default is a drastic measure that should be sparingly used. See, e.g. W.W. & W.B. Gardner, Inc. v. Parkwest Village, Inc., 568 P.2d 734, 738 (Utah 1977); Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410, 412 (1964); Flood v. Simpson, 45 Cal. App. 3d 644, 119 Cal. Rptr. 675, 680 (Ct. App. 1975); Housing Authority of Alameda v. Gomez, 26 Cal. App. 3d 368, 371 102 Cal. Rptr. 657, 659 (Ct. App. 1972); Schrerrer v. Plaza Marina Commercial Corp., 16 Cal. App. 3d 520, 523, 94 Cal. Rptr. 85, 87 (Ct. App. 1971); Cinelli v. Radcliffe, 317 N.Y.S. 2d 97, 98 (Sup. Ct. 1970).

In Crummer v. Beeler, 8 Cal. Rptr. 698 (1960), plaintiff brought suit against defendant for money allegedly had and received. On July 27, 1959, plaintiff mailed notice to defendant's attorney for the taking of defendant's deposition on august 11, 1959. By letter dated July 31, 1959, defendant's attorney suggested the alternative dates of July 23 and July 24. Plaintiff's attorney replied that he was "not deposed to consider any postponement." On August 6, 1959, defendant's attorney again wrote to plaintiff's counsel, informing him that defendant had moved to British Columbia, Canada, and offered to arrange for defendant to be present at a later date. Plaintiff's attorney responded that it was his intention to move the sanctions unless defendant appeared for the August 11 deposition. Defendant did not attend the taking of his deposition on August 11 and plaintiff moved to strike

defendant's answer and to enter judgment by default. The court granted plaintiff's motion, and from the default judgment defendant appealed. The appellate court reversed, holding that the penalty assessed was too drastic and constituted a clear abuse of discretion. Id. at 703. The court noted that the purpose of Rule 37 "and the other provisions relative to discovery is not to provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits, but to secure the just, speedy and inexpensive determination of actions." Id. at 702 (emphasis added). It is further observed that "[i]n a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered." Id.

In view of the facts and circumstances of the present case, defendant's failure to comply with the court's discovery order is excusable, so as to preclude entry of default judgment consistent with due process.

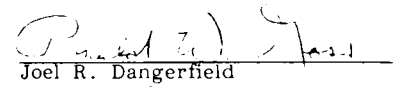
## CONCLUSION

It is undisputed that all of the activities relevant to defendants' alleged liability under the contract took place outside of Utah, and that defendants' amenability to service in Utah is premised upon telephone calls and correspondence, and a single trip to Utah to negotiate an agreement which is not at issue in this litigation.

Applying the statutory and constitutional standards of personal jurisdiction to the facts of this case, it is clear that defendants' contacts with

Utah were de minimus and not of the nature or quality as to fulfill the requisites of due process. The judgment should be reversed and remanded to the district court for entry of an order dismissing plaintiff's complaint for lack of personal jurisdiction.

RESPECTFULLY SUBMITTED,



Joel R. Dangerfield
Ronald W. Goss
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Defendants-Appellants
Marathon Ranching Co. Ltd.,
and Hans W. Roeck

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 1983, I served the foregoing Brief of Appellants' upon the attorneys for Respondents herein, by depositing two copies thereof in the United States mails, postage prepaid, addressed as follows:

Ronald C. Barker, Esq.
2870 South State Street
Salt Lake City, Utah 84115-3692
Attorneys for Synergetics, Plaintiff & Respondent

Robert L. Lord, Esq.
431 South 300 East, #444
Salt Lake City, Utah 84111
Attorney for Addland Enterprises, Inc., Plaintiff-Respondent